83-1998

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

1983 TERM

JACQUELINE MARINELLI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

WILLIAM C. KACZYNSKI, ESQ.
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26pp

QUESTION PRESENTED

WHEN AN INDICTMENT CHARGES A MAIL FRAUD SCHEME BASED ON ARSON, AND ALSO CHARGES SUBORNATION OF PERJURY AND OBSTRUCTION OF JUSTICE RELATING TO WITNESSES BEFORE THE GRAND JURY INVESTIGATING THE ARSON, BUT WHEN THE PROSECUTION THEORY OF THE MAIL FRAUD SCHEME CHANGES DURING TRIAL, DOES THE REFUSAL OF THE DISTRICT COURT TO GRANT A SEVERANCE OF THE FRAUD COUNTS DENY PETITIONER A FAIR TRIAL?

PARTIES

Petitioner is Jacqueline Marinelli, who was jointly indicted with her husband, Joseph Marinelli, in the United States District Court for the Western District of Pennsylvania. Both Defendants were convicted after a jury trial, and both Defendants perfected appeals to the United States Court of Appeals for the Third Circuit.

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OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit affirming Petitioner's conviction and sentence was rendered by memorandum opinion dated March 29, 1984. It is set forth in the Appendix at Page 1a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit entered the judgment sought to be reviewed on March 29, 1984.

Section 1254(1) of Title 28, United States Code, confers jurisdiction upon this Court to review cases and judgments in the courts of appeals by writ of certiorari. Pursuant to Rules 20.1 and 29.1 of the Rules of the United States Supreme Court, the time for filing a Petition for Writ of Certiorari began to run on March 29, 1984 and expires on May 29, 1984.

STATEMENT OF THE CASE

On December 3, 1982, a Grand Jury sitting in the Western District of Pennsylvania returned a six-count superseding indictment against Jacqueline Marinelli and her husband, Joseph Marinelli. The first two counts of the indictment charged the Petitioner herein, Jacqueline Marinelli, with violating the mail fraud statute by alleging that Petitioner Marinelli caused a fire to be set at a building owned by her, in order to collect the insurance proceeds on the building in violation of Title 18 U.S.C. Section 1341. The indictment further charged the Petitioner with two counts of obstructing justice in violation of Title 18 U.S.C. Section 1503 and one count of subornation of perjury in violation of Title 18 U.S.C. Section 1622. The obstruction of justice and subornation of perjury

counts related to an investigation being conducted into the circumstances surrounding the fire. Count 6 of the indictment charged Joseph Marinelli alone with obstruction of justice.

Prior to trial, the Petitioner moved to sever the mail fraud counts from the other counts pursuant to the provisions of Federal Rule of Criminal Procedure Nos. 8 and 14. This motion was denied, and the Petitioner proceeded to trial.

Although the indictment expressly charged that Petitioner caused the fire and falsely represented that she had nothing to do with causing the fire, the evidence presented by the Government in its case in chief failed to substantiate this. The Government's evidence indicated that a fire destroyed the Hancock Building in Franklin, Pennsylvania on May 16, 1981,

and that at the time of the fire the building was owned by the Petitioner and her father, Jack Harter. However, there was no direct evidence linking the Petitioner to the fire itself. Furthermore, the Petitioner denied participating in or causing the fire (Trial Transcript, p. 1094).

At the conclusion of the Government's case in chief, the prosecutor had to find an alternate theory of mail fraud not predicated upon the proof of Petitioner's involvement in the fire in order to permit those counts to survive Petitioner's Motion for Judgment of Acquittal (Trial Transcript, pp. 813-819).

The prosecutor was thereafter permitted to argue to the jury his alternate theory; namely, that a guilty verdict could be returned against Petitioner even if Petitioner had nothing to do with

causing the fire (Trial Transcript, pp. 1265-1266).

On March 4, 1983 the Petitioner was found guilty on all counts, and on April 14, 1983, the District Court sentenced the Petitioner to the custody of the Attorney General for imprisonment for a period of thirty months. The United States Court of Appeals for the Third Circuit denied Petitioner's appeal on March 29, 1984.

REASONS FOR GRANTING THE WRIT

The Petitioner submits that her trial was fundamentally unfair because she was forced to defend against the accusations of arson as well as obstruction of justice and subornation of perjury, in a trial where the evidence of arson was so far short of the Government's burden of proof that the Government had to fashion

an alternate theory to support the mail fraud counts (Trial Transcript, pp. 813-819).

Counts 1 and 2 of the indictment in this matter accuse the Petitioner of scheming to defraud an insurance company by causing a sworn proof of loss and a contents claim to be sent to the insurance company through the United States mails. This scheme to defraud, as set forth in the indictment, alleged the following acts by Petitioner as part of the scheme:

a. False and fraudulent pretenses, representations and promises made to the insurance company;

b. Increasing the property insurance coverage by a factor of approximately four several months before the fire;

c. Obtaining a temporary insurance coverage binder that would have expired one day after the building burned;

d. Failing to provide access to the insurance company for the purpose of a risk inspection test;

e. Evicting the residential tenants of the building after obtaining the temporary binder;

f. Advising the commercial tenants to increase their fire insurance coverage;

g. Failing to make additional utility and tax payments after obtaining the temporary binder;

h. Failing to remedy the Health and Safety Code violations of the building after obtaining the temporary binder;

i. Failing to apply for other insurance coverage when advised that the temporary insurance binder would not be renewed;

j. Causing the fire which destroyed Petitioner's building;

k. Falsely stating to the insurance company that Petitioner had not caused the fire.

l. Causing the preparation of fraudulent statements for work performed at the building prior to the fire;

m. Causing a fraudulent sworn proof of loss to be mailed to the insurance company;

n. Causing a fraudulent insurance contents claim to be mailed to the insurance company;

o. Giving a false deposition to the insurance company on two occasions.

It is apparent from the foregoing recital that the mail fraud counts of the indictment center on the alleged arson of the Hancock Building. Every act in furtherance of the scheme to defraud is meaningful only in light of the Grand Jury's belief that the Petitioner caused the fire. When the Government realized that the proof of Petitioner's participation in the fire might fall short, an alternate theory was proposed (Trial Transcript, pp. 813-819).

Under this alternate theory, the Government was permitted to argue to the jury that a guilty verdict could be returned even if the Petitioner had nothing to do with the fire (Trial Transcript, pp. 1265-1266). The Government argued that if the Petitioner tendered certain

claims to the insurance company, in the hope of receiving payment for full coverage, she could be found guilty of mail fraud even if she had nothing to do with the fire, and even if the claims themselves were not proven to be false, so long as the claims were designed to increase their recovery (Trial Transcript, pp. 814, 1266).

The Petitioner respectfully submits that this alternate theory was an improper constructive amendment of the indictment as filed by the Grand Jury. See Stirone v. United States, 361 U.S. 212 (1960); United States v. Cusmano, 659 F.2d 714 (6th Cir. 1981); United States v. Ylda, 653 F.2d 912 (5th Cir. 1981).

An impermissible constructive amendment of the indictment occurs when "the charging terms of the indictment are altered, either literally or in effect,

by prosecutor or court after the Grand Jury has last passed upon them." Gaither v. United States, 413 F.2d 1061, 1071 (D.C. Cir. 1969).

Although the Petitioner's trial counsel failed to object to this constructive amendment, he did file a written motion prior to trial to sever the mail fraud counts (Counts One and Two) from the obstruction of justice and subornation of perjury counts (Counts Three, Four and Five).

The Petitioner respectfully submits that in this context, the refusal of the District Court to sever the mail fraud counts from the remaining counts of the indictment constituted an abuse of discretion calling for the exercise of this Honorable Court's supervisory power.

The Petitioner respectfully submits that her trial was fundamentally unfair because the indictment led her to prepare

a defense to a mail fraud schreme framed as an arson, when in fact the evidence and prosecution theory developed late in the trial forced her to defend against a mail fraud scheme involving the increasing of the insurance recovery by the submission of false bills. Since Petitioner was also required to defend herself against the further counts of obstruction of justice and subornation of perjury, a severance of these charges constituted the only meaningful way to cure this unfairness. Especially is this so, where, as here, the conduct alleged to support the mail fraud counts culminated with mailings which occurred on September 11, 1981 and September 25, 1981 while the conduct alleged in the remaining counts occurred in February and March of 1982.

The record in this matter reveals that there was no direct proof that the

Petitioner caused the arson. The Government's recognition of this fact by the close of its case in chief led it to pursue the alternate uncharged theory. This alternate uncharged theory was inherently prejudicial to the Petitioner's defense of the charges and furthermore clearly prejudiced the jury's consideration of the other counts which dealt with matters other than mail fraud. It is respectfully submitted that the prejudicial effect of the injection of an uncharged theory after the close of the Government's case in chief, together with the prejudicial effect of the joinder of disparite charges was so overwhelming and fundamentally unfair as to require severance.

CONCLUSION

For the foregoing reasons, Petitioner requests this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

BY: WILLIAM C. KACZYNSKI, ESQ.
Attorney for Petitioner,
Jacqueline Marinelli

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-5274 & 83-5275

UNITED STATES OF AMERICA

vs.

JACQUELINE MARINELLI

Appellant in No. 83-5274

UNITED STATES OF AMERICA

vs.

JOSEPH MARINELLI

Appellant in No. 83-5275

Appeal From the United States District Court for the Western District of Pennsylvania - Pittsburgh
D.C. Criminal Nos. 82-00143-01 & 82-00143-02
District Judge: Gustave Diamond

Argued March 5, 1984

Before: HUNTER, BECKER, Circuit Judges, and HOFFMAN*, District Judge

Opinion filed March 29, 1984

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*Honorable Walter E. Hoffman, United States District Judge for the Eastern District of Virginia, sitting by designation

MEMORANDUM OPINION OF THE COURT

HUNTER, Circuit Judge:

1. These consolidated appeals arise from the final judgments of convictions entered after a jury trial in the United States District Court for the Western District of Pennsylvania against appellants, Jacqueline Marinelli and Joseph Marinelli. Both appellants were convicted on two counts of obstruction of justice, but under Count 6 only Joseph was involved. Mrs. Marinelli was also convicted on two counts of mail fraud and one count of subornation of perjury. Both appellants were sentenced to a total of 30 months imprisonment and 3 years probation. Mr. Marinelli was fined five thousand dollars.

2. Appellant Jacqueline Marinelli moved the district court for an order requiring an election or separate trial of Counts 1 and 2 together and Counts 3 and 4

together, pursuant to Rules 8 and 14 of the Federal Rules of Criminal Procedure. Appellant Joseph Marinelli also made a motion for severance pursuant to Rules 8 and 14, requesting that he be tried separately from Jacqueline under Counts 5 and 6.

3. The district court denied both of the motions for severance and heard the cases in a consolidated trial that resulted in the convictions of Joseph and Jacqueline Marinelli. That court determined that joinder was not erroneous as a matter of law and that neither of the defendants was prejudiced by the joinder. We agree. We will therefore affirm the convictions of Jacqueline and Joseph Marinelli.

4. The evidence presented at trial revealed that Mrs. Marinelli attempted to defraud the Reliance Insurance Company of insurance proceeds for a building that

had been destroyed by arson. Thereafter, both Mr. and Mrs. Marinelli attempted to obstruct the federal investigation of the arson and mail fraud by requesting certain individuals to prepare fraudulent statements concerning materials they supplied to James Zarilla for use at the Hancock Building prior to its destruction.

5. The Marinellis and all charges against them were properly joined in the indictment because the actions of both appellants, which led to the charges against them, were part of the same series of transactions. Joinder is proper under Rule 8 of the Federal Rules of Criminal Procedure "so long as the evidence introduced at trial connects each of the defendants to an overall scheme." United States v. Kenny, 462 F.2d 1205, 1216 (3d Cir.), cert. denied sub nom Kropke v. United States, 409 U.S. 914 (1972). "[E]ven dissimilar charges may be joined

against multiple defendants if they arise out of the same series of transactions." United States v. Roselli, 432 F.2d 879, 898 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971). The word "transaction" may "comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." United States v. Park, 531 F.2d 754, 761 (5th Cir. 1976), quoting Moore v. New York Cotton Exchange, 270 U.S. 593, 610 (1925). In this case, the actions of the Marinellis were clearly part of an overall scheme despite the fact that each of the appellants acted, in part, on his or her own. Joinder of the offenses and of the defendants was, therefore, proper under Rule 8 of the Federal Rules of Criminal Procedure.

6. The district court's refusal to grant the appellants' motions for severance did not constitute an abuse of discretion. In determining whether a defendant was prejudiced under Rule 14, we have declared that a ". . . [p]rimary consideration is whether the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants in view of its volume and limited admissability." United States v. DeLarosa, 450 F.2d 1057, 1065 (3d Cir.), cert. denied, 405 U.S. 927 (1971). Nothing in this case convinces us that the jury was unable to separate the evidence presented as proof of the charge against Jacqueline Marinelli from the evidence presented as proof of the charges against Joseph Marinelli. There was no abuse of discretion in the district court's refusal to sever in this case.

7. Accordingly, for the reasons set forth above, the order of the district court will be affirmed.

TO THE CLERK

Please file the foregoing opinion.

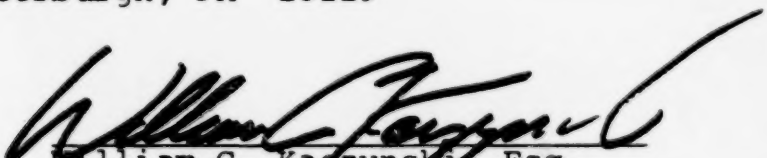
s/ James Hunter, III
JAMES HUNTER, III, Circuit Judge

CERTIFICATE OF SERVICE

I, William C. Kaczynski, Esquire, Attorney for Petitioner Jacqueline Marinelli, hereby certify that I have served a true and correct copy of the Petition for Certiorari in the within matter upon the following persons by first class mail, postage prepaid, on the 29th day of May, 1984:

Solicitor General
Department of Justice
Washington, D.C. 20530

Paul J. Brysh, A.U.S.A.
633 U.S. Post Office & Courthouse
Pittsburgh, PA 15219



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